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Lyrissa Barnett Lidsky

University of Florida Levin College of Law, lidsky@law.ufl.edu

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BRANDENBURG AND THE UNITED STATES' WAR ON INCITEMENT ABROAD: DEFENDING A DOUBLE STANDARD

*Lyrissa Barnett Lidsky**

[E]very nation must have avenues for the peaceful expression of opinion and dissent. When these avenues are closed, the temptation to speak through violence grows.

—President George W. Bush¹

We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors

—Thomas Jefferson²

I. INTRODUCTION

Although a handful of media incitement cases have made headlines in the last few years,³ the chance of a member of the

* University of Florida Research Foundation Professor, Levin College of Law. The Author thanks David Anderson, Charles Collier, Ronald Krotoszynski, Jr., Tom Cotter, Bill Page, Marty McMahon, Frank McCoy, Michael Shiver, Chris Slobogin, and, as always, Howard Lidsky. This Article benefited from the research assistance of Sherica Bryan and Robert Luck. If you have comments, please email: lidsky@law.ufl.edu.

1. President George W. Bush, Remarks by the President to the United Nations General Assembly (Nov. 10, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/11/20011110-3.html>.

2. *Whitney v. California*, 274 U.S. 357, 375 n.2 (1927) (Brandeis, J., dissenting) (quoting Jefferson as referenced by Charles A. Beard, *NATION*, July 7, 1926, at 8).

3. See, e.g., *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 242-43 (4th Cir. 1997) (holding that the First Amendment did not preclude liability for aiding and abetting a crime through the publication of the *Hit Man* manual, even if the manual did not constitute incitement); *Davidson v. Time Warner, Inc.*, No. Civ.A.V-94-006, 1997 WL 405907, at *1 (S.D. Tex. Mar. 28, 1997) (involving survivors of slain police officer who brought an unsuccessful action against record label for producing violent music that allegedly incited the shooting death of the officer); *Byers v. Edmondson*, 97-0831 (La. App. 1 Cir. 5/15/98, 712 So. 2d (Natural Born Killers case)); Rodney A. Smolla, *Should the Brandenburg v. Ohio Incitement Test Apply in Media Violence Tort Cases?*, 27 N. KY. L. REV. 1, 2-8 (2000) (discussing five court cases concerning potential media liability for

mainstream media being held liable for inciting its audience to violence is exceedingly remote.⁴ Even if state tort law permits a plaintiff to bring a case for incitement,⁵ *Brandenburg v. Ohio*⁶ sets the First Amendment bar to liability in incitement cases so high as to be almost insurmountable.⁷ In *Brandenburg*, the United States Supreme Court held that a state may not punish advocacy of violent action unless "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁸ As a practical matter, liability may not be based on a speculative connection between speech and harm; the connection must be clear, direct, and immediate.⁹ *Brandenburg* thus spreads a broad mantle of protection over the speech of radical political dissidents from even the most despised groups in society.¹⁰

The United States has expressed justifiable pride over the protection *Brandenburg* extends to the speech of political dissidents. Indeed, the United States considers the *Brandenburg* standard so fundamental that the Senate has entered reservations to several international human rights treaties to ensure that the *Brandenburg*

incitement).

4. See *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017, 1023 (5th Cir. 1987) (reversing trial court and holding that magazine article discussing autoerotic asphyxia was protected by the First Amendment); *Sanders v. Acclaim Entm't*, 188 F. Supp. 2d 1264, 1281-82 (D. Colo. 2002) (dismissing action by survivors of teacher killed in Columbine High School shootings against video game and movie companies for allegedly inciting the killing spree); *Davidson*, 1997 WL 405907, at *2 (granting summary judgment for defendant because the plaintiff was unable to make out a *prima facie* case); *McCullum v. CBS, Inc.*, 249 Cal. Rptr. 187, 197 (Cal. Ct. App. 1988) (affirming trial court's dismissal of suit against musician Ozzy Osbourne for allegedly causing a teenager to commit suicide). *But see* *Weirum v. RKO Gen., Inc.* 539 P.2d 36, 42 (Cal. 1975) (upholding judgment against radio disc jockey who negligently caused radio listeners to engage in dangerous driving which resulted in a deadly accident); *Estate of Amedure v. Warner Bros.*, No. 95-494536-NZ (Oakland County Cir. Ct., Mich. May 24, 1999) (entering judgment against the *Jenny Jones Show*).

5. See generally David A. Anderson, *Incitement and Tort Law*, 37 WAKE FOREST L. REV. 957 (2002).

6. 395 U.S. 444 (1969).

7. See Anderson, *supra* note 5, at 986 (stating that he found no cases in which liability was imposed on the media on the basis of inciting physical harm).

8. 395 U.S. at 447.

9. The speaker must intend to promote "imminent lawless action" that is "likely" to occur. *Id.* The Court has explicitly distinguished incitement from "mere advocacy" of violence. *Id.* at 448-49.

10. *But see* David R. Dow & R. Scott Shielde, *Rethinking the Clear and Present Danger Test*, 73 IND. L.J. 1217 (1998) (arguing that *Brandenburg* is not protective enough).

standard will be applied to the United States media.¹¹ Nevertheless, the United States has actively called for the suppression of speech in the foreign media that falls far short of the incitement standards set forth in *Brandenburg*. Even before September 11, 2001, the United States government encouraged and even participated in censorship of inciting propaganda in foreign media that would not meet the *Brandenburg* test of incitement.¹²

The war on terrorism, however, has made incitement in the Middle East of special concern to the current administration.¹³ Both President Bush and Congress have called for an end to incitement in the Middle East, although the incitement to which they refer seems to include simple advocacy of violence as well as true incitement.¹⁴ Of more concern, United States officials have gone so far as to ask the autocratic government of Qatar to censor Al-Jazeera, the only even arguably independent television station in the region, and an important contributor to Arab public opinion.¹⁵

While it is perfectly legitimate for the United States to attempt

11. See, e.g., *United States Initial Report to the United Nations Committee on The Convention on the Elimination of All Forms of Racial Discrimination*, Part II.B.1 (Sept. 2000), at <http://www1.umn.edu/humanrts/usdocs/cerdinitial.html>. The reservations were to Article 20(2) of the International Covenant on Civil and Political Rights, which requires parties to prohibit "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence," *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), at <http://www1.umn.edu/humanrts/instrree/b3ccpr.htm>, and to Article 4 on the Convention on Elimination of All Forms of Racial Discrimination which requires punishment of "dissemination of ideas based on racial superiority or hatred [and] incitement to racial discrimination." *United States Initial Report to the United Nations Committee on The Convention on Elimination of All Forms of Racial Discrimination*, *supra* at Part II.B.1; see also William B. Fisch, *Hate Speech in the Constitutional Law of the United States*, 50 AM. J. COMP. L. 463, 463-64 & n.2 (2002).

12. In 1999, for example, the North American Treaty Organization ("NATO") created a tribunal to shut down radio and television stations that were spreading propaganda in Kosovo. Steven Erlanger, *NATO Peacekeepers Plan a System of Controls for the News Media in Kosovo*, N.Y. TIMES, Aug. 16, 1999, at A8; see Laura R. Palmer, *A Very Clear and Present Danger: Hate Speech, Media Reform, and Post-Conflict Democratization in Kosovo*, 26 YALE J. INT'L L. 179, 180-82 (2001) (noting American "exceptionalism . . . in the domain of free expression" and supporting restrictions on the press in Kosovo in light of the fragility of the country's post-conflict transition to democracy).

13. See, e.g., Bush, *supra* note 1 (stating that the United States will do "all in [its] power" to stop "incitement, violence, and terror").

14. See *id.*

15. See Joel Campagna, *Between Two Worlds: Qatar's Al-Jazeera Satellite Channel Faces Conflicting Expectations*, SPECIAL REPORT (Oct. 2001), at www.cpj.org/Briefings/2001/al.jazeera_oct01/aljazeera_oct01.html.

to persuade foreign citizens and media not to engage in advocacy of violent acts, the administration's rhetoric suggests that the United States expects foreign governments to take action against speech that would be protected by the First Amendment in the United States. What explains this apparent hypocrisy? Is this simply another example of the United States touting democracy at home while supporting despotism abroad? Or is the *Brandenburg* incitement standard so socially and culturally contingent that it is not appropriate for export, at least to the Arab Middle East? My ultimate goal in this Article is to explore whether, as part of the war on terror, the United States ought to support or even demand censorship of incitement abroad that falls short of true incitement as defined by *Brandenburg*. More fundamentally, however, this Article will attempt to demonstrate that *Brandenburg* both assumes the existence of, and helps constitute, a distinctively American "marketplace of ideas" that makes *Brandenburg* appropriate here but unfit for export to many other countries.

II. THE AL-JAZEERA CONTROVERSY

At the outset, it is appropriate to give some context to the debate over Al-Jazeera. Al-Jazeera, the first and only twenty-four-hour Arabic-language news channel,¹⁶ has been dubbed the "CNN of the Middle East."¹⁷ Based in the tiny Middle Eastern country of Qatar, whose population is less than 700,000, Al-Jazeera reaches thirty-five million viewers in the Arab world and beyond.¹⁸ Although Al-Jazeera received its initial funding from the Emir of Qatar,¹⁹ it

16. MOHAMMED EL-NAWAWY & ADEL ISKANDAR, *AL-JAZEERA: HOW THE FREE ARAB NEWS NETWORK SCOOPED THE WORLD AND CHANGED THE MIDDLE EAST* 24 (2002); see also Rick Zednik, *Inside Al Jazeera*, COLUM. JOURNALISM REV., Mar.-Apr. 2002, at 44, 45 ("Al Jazeera is the only twenty-four-hour Arab news station.").

17. See, e.g., Roger Simon, *Waging the Spin War*, U.S. NEWS & WORLD REP., Oct. 22, 2001, at 29 (employing this term). It is ironic that Al-Jazeera has been the prime target of criticism. For example, Al-Jazeera's programming is moderate in comparison to the explicit propaganda found on Lebanon's Al-Manar, the official television station of Hezbollah. Deborah Blachor, *Hezbollah TV Hate Message Big on W. Bank*, N.Y. DAILY NEWS, Oct. 12, 2002, at 31.

18. EL-NAWAWY & ISKANDAR, *supra* note 16, at 34.

19. *Id.* at 33. Despite its hard-hitting coverage of other Middle Eastern governments, Al-Jazeera has avoided criticism of the monarchy in Qatar. *Id.* at 83. The creation of Al-Jazeera was "part of an effort to modernize and democratize Qatar." Zednik, *supra* note 16, at 44. The station manager has stated that Al-Jazeera is not currently subsidized by the Qatari government. *Id.* at 47. Some have argued that the Qatari government "use[s Al-Jazeera] as a [public relations] tool for the outside world" EL-NAWAWY & ISKANDAR, *supra* note 16, at 86 (quoting the former chairman of Qatar University's

enjoys a degree of editorial freedom that sets it apart from the other Arabic-language stations in the region. Its uncensored news coverage and free-wheeling discussions of hot-button political, cultural, and social issues are unparalleled in a region where state-controlled television is the norm. Al-Jazeera's talk shows and call-in shows are particularly popular, as is its willingness to deal with taboo subjects in the Middle East, such as the equality of women, polygamy, female circumcision, normalization of relations with Israel, and government corruption.²⁰ Al-Jazeera's controversial and inflammatory programming makes it one of the most watched news stations in the region.²¹ Indeed, so influential is Al-Jazeera that numerous Middle Eastern governments have filed complaints about its programming with the government of Qatar. Tunisia and Libya temporarily withdrew their ambassadors from Qatar after Al-Jazeera broadcast material critical of their governments, and, most recently, Jordan temporarily closed the Al-Jazeera bureau there for negative coverage of its government.²²

However, most Americans did not become acquainted with Al-Jazeera until October of 2001. Al-Jazeera was the only foreign news outlet allowed to stay in Taliban-held Afghanistan during the first part of the war on terror.²³ Al-Jazeera's singular access allowed it to obtain "live footage of bombs falling on Kabul,"²⁴ as well as "the only video pictures of Afghan demonstrators attacking and setting fire to the United States embassy."²⁵ Al-Jazeera also repeatedly aired an exclusive 1999 interview with Osama bin Laden.²⁶ More startling

Communications Department).

20. Zednik, *supra* note 16, at 45. Al-Jazeera has promoted "the empowerment of Arab women to exercise their right to seek and receive information and ideas." EL-NAWAWY & ISKANDAR, *supra* note 16, at 59; *see also* Kai Hafez, *Introduction: Mass Media in the Middle East: Patterns of Political and Societal Change*, in MASS MEDIA, POLITICS & SOCIETY IN THE MIDDLE EAST 7 (Kai Hafez ed., 2001) ("The only TV channel [in the Arab world] that deserves to be called 'diverse' is Al-Jazeera . . .").

21. Zednik, *supra* note 16, at 47 (asserting that Al-Jazeera is "the region's most-viewed news network and second-most-watched pan-Arab station"). *But see* Fouad Ajami, *What the Muslim World Is Watching*, N.Y. TIMES, Nov. 18, 2001 (Magazine), at 48, 78 (noting that other Arab channels, like the London-based Middle East Broadcasting Centre and Lebanese Broadcasting International, reach "much wider audiences").

22. Zednik, *supra* note 16, at 47.

23. Ajami, *supra* note 21, at 51.

24. Zednik, *supra* note 16, at 45.

25. *Al-Jazeera Goes It Alone* (BBC News television broadcast, Oct. 8, 2001), available at http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/1579929.stm.

26. Zednik, *supra* note 16, at 45.

still was Al-Jazeera's October broadcast of a "home movie" of Osama bin Laden gloating over the September 11 attacks, which subsequently was picked up by other media around the world.²⁷ Since then, Al-Jazeera repeatedly has "scooped" all other television news networks by obtaining interviews with bin Laden (one of which it chose not to air),²⁸ and footage and messages from Al-Qaeda.²⁹ Most recently, on November 12, 2002, Al-Jazeera broadcast a recording, said to be of bin Laden, praising recent terror attacks and threatening future attacks.³⁰

Perhaps understandably, American policymakers have questioned whether Al-Jazeera is, in fact, an objective news outlet or a willing weapon in Al-Qaeda's propaganda war against the United States.³¹ In early October of 2001, United States Vice President Dick Cheney met with the Emir of Qatar, asking him to rein in Al-Jazeera's anti-Americanism and to prevent the station from acting as a mouthpiece for bin Laden.³² The United States government also filed a formal diplomatic complaint with the government of Qatar, on the ground that its inflammatory coverage was inciting Arab public opinion against the United States.³³ This did not deter Al-Jazeera, however. It aired a bin Laden tape and another tape containing Al-Qaeda military propaganda on November 3, 2001,³⁴ which again was picked up by CNN and other Western media.³⁵ A few days later, on November 13, a United States bomb destroyed the Kabul bureau of Al-Jazeera. Although United States government officials claimed the bombing was accidental, their denials were met

27. James Risen & Patrick E. Tyler, *A Nation Challenged: Propaganda; Interview With bin Laden Makes the Rounds*, N.Y. TIMES, Dec. 12, 2001, at B5 (placing the date of the release of the "home movie" of bin Laden as October 7, 2001).

28. See *id.* (placing the date of the interview with bin Laden, which Al-Jazeera did not broadcast, as October 20, 2001).

29. See EL NAWAWY & ISKANDAR, *supra* note 16, at 155 (mentioning a December 27, 2001 broadcast of a tape received from bin Laden).

30. James Risen & Neil MacFarquhar, *New Recording May Be Threat From bin Laden*, N.Y. TIMES, Nov. 13, 2002, at A1 (discussing the broadcast).

31. See, e.g., EL NAWAWY & ISKANDAR, *supra* note 16, at 155-56 (noting that critics have argued that Al-Jazeera is a propaganda outlet for bin Laden); Michael Hirsh, *Bush and the World*, FOREIGN AFF., Sept.-Oct. 2002, at 27 (arguing that the message of extremist Islam "is carried daily by Al-Jazeera, the pan-Arab 'news' station").

32. Zednik, *supra* note 16, at 47.

33. EL NAWAWY & ISKANDAR, *supra* note 16, at 175-76.

34. *Id.* at 153.

35. *Id.* at 154.

with a great deal of skepticism, both by Al-Jazeera itself³⁶ and by independent commentators.³⁷

Since then, at least one influential commentator, Fouad Ajami, has accused Al-Jazeera of making bin Laden its "star" and of "deliberately fan[ning] the flames of Muslim outrage."³⁸ Ajami gave dramatic examples of Al-Jazeera's anti-Western and anti-Semitic bias, and of its tendency to cater to its viewers' rage against the West.³⁹ Indeed, Al-Jazeera gave widespread airplay to the notions that bin Laden was not responsible for September 11 and that the war in Afghanistan was simply an American crusade against Muslims.⁴⁰ Al-Jazeera has also fueled Palestinian rage by repeatedly showing the photo of a dead Palestinian boy allegedly shot by Israeli soldiers and by referring to suicide bombers as "martyrs."⁴¹ Ajami urged the United States to treat Al-Jazeera as a "dangerous force," whose "virulent anti-American bias undercuts all of its virtues."⁴² After its initial forays in attempting to silence Al-Jazeera, however, the Bush administration appears to have shifted to trying to beat Al-Jazeera at its own game. Administration officials have gone on Al-Jazeera to explain United States policy directly to the Arab world,⁴³ and the administration has also hired a Madison Avenue advertising guru to improve the United States' image abroad.⁴⁴ The Bush administration, thus, seems to be shifting from a command model to a persuasion model in an effort to influence coverage of the war on terror in the Middle East.

The controversy over Al-Jazeera remains important, however, because it raises larger issues about how the United States ought to address virulent anti-Americanism in Middle Eastern media—an issue that will almost certainly resurface if the United States invades Iraq. Clearly, the United States already has an "image problem"⁴⁵ in the Arab Middle East, and the attempt of the United States to use its muscle to silence negative coverage on Al-Jazeera opened its policy to attack as yet another instance of America

36. *Id.* at 169.

37. Nik Gowing, *Full Text of Nik Gowing's Al-Jazeera Feature*, MEDIA GUARDIAN (Apr. 8, 2002) (saying that the bombing of Al-Jazeera's Kabul bureau raises "sinister" questions), at <http://media.guardian.co.uk/mediaguardian/story/0,7558,679641,00.html>.

38. Ajami, *supra* note 21, at 48, 50.

39. *See id.* at 50.

40. *See id.* at 53, 76.

41. *Id.* at 50.

42. *Id.* at 78.

43. EL-NAWAWY & ISKANDAR, *supra* note 16, at 157-58.

44. Ajami, *supra* note 21, at 78.

45. Peter G. Peterson, *Public Diplomacy and the War on Terrorism*, FOREIGN AFF., Sept.-Oct. 2002, at 76-77.

applying a “double standard”⁴⁶ in the Middle East. This criticism is particularly troubling in light of the fact that Al-Jazeera is the only even arguably independent television station in a region whose media is so state-dominated that in August 1990 it “withheld news of Iraq’s conquest of Kuwait for three days.”⁴⁷ The double standard criticism also draws its force from the fact that the United States government would not use such heavy-handed tactics against the United States media, or, most likely, even against other Western media. For example, a French author wrote a book claiming that the United States government fabricated the events of September 11.⁴⁸ The book became a bestseller in France and is being published in the United States.⁴⁹ Still, the United States government has not accused the French of inciting their citizens against Americans, nor has the United States leaned on the French government to take action against the author.

Some will simply respond that governmental hypocrisy is fine in the name of protecting United States interests. According to this argument, just as we support an autocratic regime in Saudi Arabia because we need them as an ally,⁵⁰ so should we encourage government censorship of anti-Americanism on Al-Jazeera. Yet even as an exercise in *realpolitik*, the Bush administration’s heavy-handedness in trying to muzzle Al-Jazeera has been a failure. Accusations that the United States applies double standards in its dealings with Arab countries have been used to stir Arab public

46. JOHN L. ESPOSITO & JOHN O. VOLL, *ISLAM AND DEMOCRACY* 201 (1996) (stating that there is a “perception and charge that the U.S. and European governments are guilty of employing a ‘double standard,’ a democratic one for the West and selected allies and another for the Middle East and Islamic movements”); SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* 184 (1996) (noting that “non-Westerners” are quick to point out Western double standards, and arguing that “[d]ouble standards in practice are the unavoidable price of universal standards of principle”); BASSAM TIBI, *THE CHALLENGE OF FUNDAMENTALISM: POLITICAL ISLAM AND THE NEW WORLD DISORDER* 185 (1998) (observing that “the West, despite all its lip service, has not been favorable to the democratization process in the World of Islam”); Peterson, *supra* note 45, at 76-77 (stating that United States support for “autocratic regimes” in the Middle East underlies much of the “negative attitudes [of Middle Easterners] toward the United States”).

47. EL-NAWAWY & ISKANDAR, *supra* note 16, at 68 (noting that in Syria, Iraq, Sudan, and Libya “there is virtually no freedom of the press” and that although there is an “opposition press of sorts” in Jordan and Egypt, it is tightly constrained in criticism of the government); Ajami, *supra* note 21, at 78.

48. THIERRY MEYSSAN, *9/11 THE BIG LIE* (2002).

49. Scott Shane, *Viewing 9/11 as the Big Lie*, *BALT. SUN*, Sept. 12, 2002, at 2A.

50. For acerbic criticism of our hypocrisy in this regard, see Maureen Dowd, *I’m With Dick! Let’s Make War!*, *N.Y. TIMES*, Aug. 28, 2002, at A19.

opinion against the United States and even (by some) to justify violence and terrorism.⁵¹ Thus, before the United States can even argue persuasively that Middle Eastern media should engage in self-censorship, the United States must be able to make a case for censorship of speech abroad that would be protected at home.

The case for American exceptionalism⁵² can and should be made to refute the charge that we are applying a double standard in the Middle East. Absent adequate justification (and perhaps even with adequate justification), attempts to silence Al-Jazeera or other Middle Eastern media are likely to cause the United States more harm than good. More to the point, if we are sanguine about condemning the media in foreign countries as being too incendiary and inciting public opinion, we run the risk of becoming unduly cavalier in making accusations of incitement against our own media. Especially during war-time,⁵³ it is important to remind ourselves of the features of American political discourse that permit us to tolerate radical dissent and inflammatory speech. As Professor Steven Shiffrin has written: "If the first amendment is to serve as an important cultural symbol, the modes of justification we use to persuade ourselves and others of its value and importance are themselves of special importance."⁵⁴ A review of the philosophical foundations of *Brandenburg* may help us to remember why we should tolerate radical dissent at home even in times of war and should aid us in avoiding the trap laid by fear.⁵⁵

III. THE MARKETPLACE OF IDEAS ENVISIONED BY *BRANDENBURG*

*Brandenburg v. Ohio*⁵⁶ is the dominant case in the United States

51. See ESPOSITO & VOLL, *supra* note 46, at 201.

52. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 729 (2000) ("[I]t is . . . important to recognize that America really is exceptional Despite our present military and cultural hegemony, we should be very reluctant to hold the American system up as an ideal for aspiring democracies throughout the world.").

53. See generally Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919) (discussing First Amendment rights in the context of the Espionage Act of 1917 and World War I).

54. STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 110-11 (1990).

55. See Sandra Coliver, *Commentary on the Johannesburg Principles on National Security, Freedom of Expression and Access to Information*, in *SECRECY AND LIBERTY: NATIONAL SECURITY, FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION* 11, 13 (Sandra Coliver et. al. eds., 1999) ("Courts in countries around the world tend to demonstrate the least independence and greatest deference to the claims of government when national security is invoked.").

56. 395 U.S. 444 (1969).

protecting the right of citizens to advocate lawless action. Although *Brandenburg* announces the current test for incitement, it is the context of the case that makes its protection of speech advocating violence so extraordinary. In *Brandenburg*, the Supreme Court defended the First Amendment right of a hooded Ku Klux Klan speaker to exhort his audience to “[s]end the Jews back to Israel,” and to “[b]ury the niggers.”⁵⁷ The speaker further stated that if the government “continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken.”⁵⁸ The speech took place at an “organizers’ meeting” of the Klan, at which some of the attendees were clearly armed.⁵⁹

In striking down Ohio’s prosecution of the speaker for advocating criminal activity, the Court stated that the First Amendment does not allow “a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁶⁰ Therefore, in order for a speaker to be prosecuted for incitement, the State must show: (1) intent to incite another; (2) to imminent violence; and (3) in a context that makes it highly likely that such violence will occur.⁶¹ The test seeks to ensure that suppression of speech is not based on fear or dislike of radical ideas and radical speakers. As Professor Elizabeth Wilborn Malloy has written “*Brandenburg*, properly understood . . . governs abstract exhortations to lawless action which might incite a sufficiently susceptible person to action.”⁶² In application, however, *Brandenburg* assumes most citizens are not susceptible to the impassioned rhetoric of a radical speaker.

The *Brandenburg* incitement test did not materialize from thin air. *Brandenburg* represents the fruition of a libertarian theory of free speech planted by Justices Oliver Wendell Holmes and Louis D. Brandeis⁶³ in a series of (mostly) dissenting opinions in cases

57. *Id.* at 446 n.1.

58. *Id.* at 446.

59. *Id.* at 445-46.

60. *Id.* at 447.

61. See S. Elizabeth Wilborn Malloy & Ronald J. Krotoszynski, Jr., *Recalibrating the Cost of Harm Advocacy: Getting Beyond Brandenburg*, 41 WM. & MARY L. REV. 1159, 1194 (2000) (indicating that “[s]ince *Brandenburg*, the imminence requirement has become the central focus of the test”).

62. S. Elizabeth Wilborn Malloy, *Taming Terrorists But Not “Natural Born Killers,”* 27 N. KY. L. REV. 81, 85 (2000).

63. But see MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* 108 (1991) (“Unfortunately, upon close examination, virtually all of Holmes’s reputation as the great modern defender of civil liberty rests on the last paragraph of the *Abrams* dissent.”).

brought against war protestors and social radicals following World War I.⁶⁴ In these decisions, Holmes and Brandeis eloquently and forcefully developed our modern theory of the First Amendment—a theory predicated on a particular type of relationship between the citizen and the state, a particular model of political discourse, and even a particular type of citizen.

Linguistically, *Brandenburg*'s antecedent was the clear and present danger test, which made its first Supreme Court appearance in Justice Holmes's opinion in *Schenck v. United States*.⁶⁵ *Schenck* involved a felony conviction under the Espionage Act of 1917 for publishing pamphlets critical of the United States war effort and targeted to men who had been drafted to fight in World War I.⁶⁶ Justice Holmes, writing for the Court, identified the relevant question in determining the constitutionality of the Espionage Act as whether the speaker's words "create[d] a clear and present danger that they [would] bring about the substantive evils that Congress has a right to prevent."⁶⁷ As applied, however, the clear and present danger test focused merely on the "tendency" of defendant's speech to interfere with the draft; Holmes did not demand any proof that the pamphlets actually interfered with the war effort.⁶⁸ Thus, the Supreme Court unanimously upheld the defendant's conviction; the clear and present danger test justified suppression of radical speech rather than protection of it.

64. See David M. Rabban, *The Emergence of the Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1317 (1983) (discussing the lineage of Holmes and Brandeis dissents).

65. 249 U.S. 47 (1919). The application of an incitement test in this context, however, originated not with Holmes, but with Judge Learned Hand's opinion in *Masses Publ'g Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917). See Dow & Shieldes, *supra* note 10, at 1223 (citing GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 151 (1994)). Moreover, Zechariah Chafee stated that Holmes had "drawn[n] the boundary line very close to the test of incitement at common law." ZECHARIAH CHAFEE, JR., *FREEDOM OF SPEECH* 89 (1920).

66. 249 U.S. at 48-49.

67. *Id.* at 52.

68. *Id.* ("If the act, (speaking, or circulating a paper,) its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime."); see also Rabban, *supra* note 64, at 1229 (discussing the "bad tendency" approach to speech). A week after *Schenck* was decided, Holmes also affirmed convictions under the Espionage Act in *Frohwerk v. United States*, 249 U.S. 204 (1919), and *Debs v. United States*, 249 U.S. 211 (1919). See also G. Edward White, *The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth-Century America*, 95 MICH. L. REV. 299, 318 (1996) (stating that "[a]t least until *Abrams*, Holmes did not appear to treat his celebrated 'clear and present danger' dictum in *Schenck* as incompatible with the bad tendency test").

Shortly afterward, however, Holmes, with some prompting from libertarian thinkers,⁶⁹ recast the clear and present danger test in order to protect speech. In *Abrams v. United States*,⁷⁰ Holmes (and Brandeis) dissented from the prosecution of five Russian socialist immigrants for distributing pamphlets protesting United States involvement in World War I.⁷¹ Although Holmes had nothing but contempt for the “creed” that the defendants “avow[ed],”⁷² he believed that the speech of “these poor and puny anonymities” had little chance of hindering the war effort and that the government had failed to establish that the defendant specifically intended to hinder that effort.⁷³ Instead of focusing on the “tendency” of defendant’s speech to hinder the war effort, Holmes argued that speech may not be suppressed unless it presents an imminent threat of “immediate” harm.⁷⁴ “Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the [First Amendment].”⁷⁵

Thus formulated, Holmes’s clear and present danger test makes several fundamental assumptions about American political discourse. First, the correction of evil counsels can be left “to time” because rationalism will ultimately prevail.⁷⁶ Professor G. Edward White has noted that Holmes was a “modernist,” by which he means, among other things, that Holmes believed that “humans are inherently rational beings.”⁷⁷ Given enough time for reflection, Holmes believed that human beings would reject unsound creeds

69. Judge Learned Hand wrote to Holmes to persuade him that the incitement test was preferable to the test laid out in *Schenck*. Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 758-59 (1975); see also G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 420-30 (1993) (discussing the influence of Harold Laski, Felix Frankfurter, and Zechariah Chafee on the evolution of Holmes’s views in the spring and summer of 1919); Chafee, *supra* note 53, at 969 (praising the clear and present danger test as protecting freedom of speech).

70. 250 U.S. 616 (1919) (Holmes, J., dissenting).

71. *Id.* at 628-29.

72. *Id.* at 629.

73. *Id.* (“I think the intent must be the specific intent that I have described and for the reasons that I have given I think that no such intent was proved or existed in fact.”).

74. *Id.* at 630; see also *id.* at 627 (“[T]he United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.”).

75. *Id.* at 630-31.

76. *Id.* at 630.

77. G. Edward White, *The Canonization of Holmes and Brandeis: Epistemology and Judicial Reputations*, 70 N.Y.U. L. REV. 576, 579 n.11 (1995).

and dogma such as those advocated by the *Abrams* defendants.⁷⁸ Thus, rational deliberation is an antidote to violence. But this belief in rationalism is also of necessity coupled with a belief in the fundamental stability of the American polity; only in extreme circumstances will radical speakers be able to capture the public imagination because rationalism will offset any tendency toward radicalism.

In addition to assuming rationalism and stability in public discourse, Holmes also assumes a model of public discourse that is open and unmediated. In order for evil counsels to be corrected, the debate has to be left open for other voices to refute the evil counsels. This point is made explicit in Holmes's famous marketplace of ideas metaphor, which also comes from his *Abrams* opinion. Holmes, drawing on Milton and John Stuart Mill,⁷⁹ stated: "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which [the] wishes [of the people] safely can be carried out."⁸⁰ Here, too, the model of public discourse is of widespread citizen participation in public discussions free from government domination. The citizens upon whom the model relies are rational and skeptical actors, prepared to engage in public debate to defeat obvious falsehoods. The model also assumes that speech plays an essential role in promoting peaceful, social change in a democratic society. Speech is the avenue for discovering the truth that will form the basis of rational social policy; it is the way that the wishes of the people can be carried out by their government.⁸¹ Although Holmes did not phrase it in these terms, the fact that open public discussion serves as a safety valve for public discontent is itself another reason radical dissent need not lead to violence in a properly functioning democracy.

This analysis of Holmes suggests that the clear and present

78. White, *supra* note 68, at 320 (noting the elitist underpinnings of Holmes' theory).

79. MARC A. FRANKLIN ET AL., MASS MEDIA LAW 12 (6th ed. 2000).

80. *Abrams*, 250 U.S. at 630.

81. Holmes made this point explicit in *Gitlow v. New York*, 268 U.S. 652 (1925) (Holmes, J., dissenting), in which he determined that there was no likelihood that the defendant's Socialist manifesto would cause a "present conflagration." *Id.* at 673. Holmes further stated, however, that: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." *Id.* I believe the emphasis here should be laid on the phrase "in the long run." Although Holmes was famously a skeptic about human nature, I think it is obvious that Holmes believed that socialist ideas would not prevail in the long run because they would be defeated by rationalist argumentation in the marketplace of ideas.

danger test (upon which our modern incitement doctrine is based) depends on a particular form of public discourse and particular types of citizens. Hence, the reason we can tolerate "expression of opinions that we loathe and believe to be fraught with death"⁸² is that our mode of public discourse has built-in safeguards against mass violence. These safeguards include rationalism as the criterion for argumentation; engaged citizens who have the ability to deliberate rationally on issues of social policy and to pursue change through an open and unmediated public discourse; and a variety of voices willing to refute those who call for violence and revolution. It also assumes that government domination of the marketplace of ideas will prevent citizens from receiving the information necessary for rational deliberation that stems violence. Such analysis, then, might form the beginning of an explanation and defense of American exceptionalism in tolerating propaganda at home but not abroad.

However, such an analysis would be incomplete without surveying the contributions of Louis Brandeis. Justice Brandeis amplified upon, and added to, Holmes's themes in his lyrical concurring opinion in *Whitney v. California*⁸³—"arguably the most important essay ever written, on or off the bench, on the meaning of the first amendment."⁸⁴ Anita Whitney was convicted of a felony under California's Criminal Syndicalism Act for being a founding member of the Communist Labor Party, whose platform advocated "revolutionary class struggle."⁸⁵ In applying the clear and present danger test, Brandeis wrote that the state must show "either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe such advocacy was then contemplated."⁸⁶ More important than *Whitney's* refinement of the clear and present danger test, though, is its comprehensive discussion of why the State must tolerate speech it believes "to be false and fraught with evil consequence."⁸⁷ In defining how far we must go in tolerating potentially inciting speech, Brandeis wrote:

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless

82. *Abrams*, 250 U.S. at 630.

83. 274 U.S. 357 (1927) (Brandeis, J., concurring).

84. Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 668 (1988).

85. *Whitney*, 274 U.S. at 363.

86. *Id.* at 376.

87. *Id.* at 374.

reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.⁸⁸

Although a complete analysis of the nuances of Brandeis's opinion is beyond the scope of this Article,⁸⁹ it is necessary to illustrate what Brandeis assumed to be the background conditions that allow us to tolerate speech we believe to be "fraught with evil consequence[s]."⁹⁰ First, it is noteworthy that Brandeis echoes many of the themes expressed by Holmes in *Abrams*. An example of Brandeis's faith in rationalism is his belief that speech is likely to present a risk of imminent harm only when there is no opportunity for "full discussion."⁹¹ He echoes this sentiment elsewhere when he identifies as a core principle of our democracy that "deliberative forces should prevail over the arbitrary."⁹² Brandeis also assumes that debate must be free and unfettered. Even more than Holmes, Brandeis sees full citizen participation in public debate as essential in a system committed to the ideal of self-government⁹³—indeed, Brandeis stresses that "public discussion is a political duty."⁹⁴ Hence, a democratic society can, and must, tolerate potentially inciting speech because brave citizens will perform their public duty in refuting what they believe to be "noxious doctrine."⁹⁵

For Brandeis, then, a precondition for toleration of dissident speech is what Vincent Blasi has termed "civic courage."⁹⁶ Brandeis's opinion is replete with language about fear and courage. Toleration of speech with which we disagree requires courage, and, moreover, requires us to be "fearless" in insuring that proper

88. *Id.* at 377.

89. This work has admirably been performed by Blasi, *supra* note 84.

90. *Whitney*, 274 U.S. at 374.

91. *Id.* at 377.

92. *Id.* at 375.

93. As G. Edward White has shown, "broaden[ing] the base of popular involvement in government" and "encourag[ing] larger numbers of citizens to participate in public discourse" were goals of the Progressive Movement. White, *supra* note 68, at 315.

94. *Whitney*, 274 U.S. at 375.

95. *Id.*

96. Blasi, *supra* note 84, at 690 ("To Brandeis, the measure of courage in the civic realm is the capacity to experience or anticipate change—even rapid and fundamental change—without losing perspective or confidence.").

"reasoning [is] applied through the processes of popular government."⁹⁷ The suppression of radical speech almost always is an exercise of "irrational fears," and more precisely irrational fear of "political change."⁹⁸ Rather than "silence coerced by law," radical speech must be answered with "reason as applied through public discussion."⁹⁹ It is only through unfettered public discussion of "grievances and proposed remedies" that the proper balance between stability and change may be maintained.¹⁰⁰ As a corollary, it is fair to assume that Brandeis is only willing to tolerate speech advocating violence because democracy provides a corrective in the form of free speech; the alternative, state coercion, is not only unnecessary but dangerous and stifles the search for truth. At the heart of Brandeis's opinion, therefore, lies a model of free and unfettered public discourse participated in by a wide variety of engaged and informed citizens performing their democratic duty of self-governance.¹⁰¹

Several other points are worth noting about the modern American marketplace of ideas. It goes without saying that Holmes and Brandeis, and indeed all of their successors, believed in the rule of law, for they asserted the Constitution as an external constraint on both the will of elected legislators and their own behavior. It is also clear that the marketplace of ideas metaphor implicitly envisions a thriving civil society, a realm where public debate can occur free from governmental coercion.¹⁰² Finally, although none of the clear and present danger test cases dealt specifically with the role of the press in the marketplace of ideas, it is clear that the press plays an important role, not only as a conduit for speakers to get their ideas into the marketplace, but also as a source of factual

97. *Whitney*, 274 U.S. at 377.

98. *Id.* at 376-77 ("Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.").

99. *Id.* at 375-76.

100. *Id.* at 375.

101. See White, *supra* note 68, at 325 (discussing the self-governance rationale in Brandeis's *Whitney* concurrence).

102. See BERNARD LEWIS, WHAT WENT WRONG?: WESTERN IMPACT AND MIDDLE EASTERN RESPONSE 110 (2002) (defining "civil society" as "part of society, between the family and the state, in which the mainsprings of association, initiative, and action are voluntary, determined by opinion or interest or other personal choice, and distinct from—though they may be influenced by—the loyalty owed by birth and the obedience imposed by force"). "Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

information that can foster the search for truth. Like individual speakers, the various media contribute to the marketplace of ideas; and competition among competing media outlets is just as important as competition among other types of speakers if the truth is to emerge.

These, then, are the philosophical underpinnings of *Brandenburg* (and indeed of much of modern First Amendment jurisprudence), underpinnings that the *Brandenburg* opinion itself does not really discuss but merely accepts as givens.¹⁰³ At the time *Brandenburg* was decided, the Supreme Court had begun applying the clear and present danger test to a variety of cases,¹⁰⁴ and although the original form of the test has fallen out of use,¹⁰⁵ it has remained a crucial symbol of our toleration of radical speech. Why, then, should we be hesitant to argue in favor of exporting this cultural symbol to the Middle East?

Before answering this question, caveats are in order. First, the marketplace of ideas is an ideal that has never been fully realized in this country. As a practical matter, many viewpoints never enter the marketplace of ideas. Some citizens are barred from meaningful participation in the marketplace by lack of money or education; others find that their class, race, or gender impairs their ability to be heard. Moreover, giant media corporations, driven by profit motives, may set the parameters of public debate according to what they think may be profitable, rather than to what information citizens need to know.¹⁰⁶ Even the Internet, which allows many more citizens access to a medium of mass communication, does not guarantee that all citizens will be heard.¹⁰⁷ And even if a fully

103. Indeed, the only "philosophical" discussions of the case are in the concurrences of Justices Black and Douglas, who argue that the clear and present danger test is insufficiently protective of free speech. *Brandenburg v. Ohio*, 395 U.S. 444, 449-50, 454 (1969) (Black & Douglas, JJ., concurring); see RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 115 (1992) (viewing *Brandenburg* as the legacy of the Holmes/Brandeis clear and present danger test).

104. See, e.g., *Yates v. United States*, 354 U.S. 298, 318-24 (1957) (distinguishing between advocacy of abstract doctrine and advocacy directed at inciting or promoting violent, unlawful action); *Dennis v. United States*, 341 U.S. 494, 507-11 (1951) (recognizing that the clear and present danger test had become the dominant view, although the plurality did not apply it).

105. FRANKLIN ET AL., *supra* note 79, at 83 (stating that the clear and present danger test "is rarely used today").

106. See Ronald J. Krotoszynski, Jr., *The Inevitable Wasteland: Why the Public Trustee Model of Broadcast Television Regulation Must Fail*, 95 MICH. L. REV. 2101, 2108-10 (1997).

107. See Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 894-98 (2000) (arguing that the Internet has the potential to cure some of the "defects" in the marketplace of

functioning marketplace of ideas were realized, there is no guarantee that truth would emerge (as evidenced by the persistence of such widespread popular delusions as the belief in U.F.O.s). Even so, it is fair to conclude that the lack of government domination of the American marketplace of ideas does allow more competition within that marketplace, and that the often passionate and aggressive debate that occurs there serves to reduce actual violence.

A second caveat is that the United States' commitment to protecting potentially inciting propaganda has been strongest when the speech at issue came from a fringe group not threatening the majority's way of life. It was clear at the time *Brandenburg* was decided that the Ku Klux Klan was a fringe group, albeit a terrifying and violent one especially to African-Americans and Jews, which could not hope to gain majority support in American society. Moreover, the United States' commitment to broad protection of inciting propaganda in wartime or times of national crisis has proved embarrassingly limited. The clear and present danger test, upon which the *Brandenburg* incitement standard is based, was used to suppress the speech of communists, socialists, and other radicals more often than it was used to protect them.¹⁰⁸ Particularly noteworthy in this regard is the xenophobia that undergirded many of the Espionage Act prosecutions during and following World War I.¹⁰⁹ In *Abrams*, for example, the trial judge "repeatedly reminded the jury of the defendant's alien status and several times asked Abrams, 'Why don't you go back to Russia?'"¹¹⁰ Then, as now, the United States was afraid of disloyal immigrant populations in its midst during wartime, and these groups were targeted for prosecution because of their speech. Thus, even in the United States, our commitment to protecting potentially inciting speech is more limited than our rhetoric would suggest. Nevertheless, it is worthwhile to question whether the background assumptions that lead us to assert toleration as an ideal within the United States are even in place in the Middle East. If such assumptions do not hold, a

ideas).

108. See generally Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 456-57 (1985) (discussing the "fragility" of our commitment to free speech "in times of stress"); Dow & Shieldes, *supra* note 10, at 1219-35 (recounting the "somewhat embarrassing legal history" of the clear and present danger test).

109. See GRABER, *supra* note 63, at 80-81 (arguing that after World War I was declared, "many Americans confused suppression of the political dissident with suppression of the disloyal immigrant").

110. *Id.* at 81 (noting also that "[x]enophobia continued to be closely associated with censorship after the war").

double standard for suppressing inciting speech may well be justified.

IV. AL-JAZEERA AND THE MARKETPLACE OF IDEAS IN THE ARAB MIDDLE EAST

Contrast the American marketplace of ideas envisioned by Holmes and Brandeis with the marketplace of ideas in the Arab Middle East.¹¹¹ Stated bluntly, there are no guarantees at the present time that rationalism will prevail in the Arab marketplace of ideas, especially in matters relating to the United States. As el-Nawawy and Iskandar wrote in their study of Al-Jazeera, the “average Middle Easterner” filters “public issues . . . through the prism of conspiracy,”¹¹² and views the West as conspiring against Islam and the Arab world.¹¹³ Even Western media tend to be viewed as a tool of cultural imperialism.¹¹⁴ As one example of this filter of conspiracy in operation, both the Gulf War and the attacks on Bosnian Muslims have been widely perceived as “Christian Crusades.”¹¹⁵ Perhaps, therefore, it should not be so shocking that a poll taken in the aftermath of September 11 found that a majority of Arab Muslims (sixty-one percent) did not believe that Arabs carried out the attacks on the World Trade Center.¹¹⁶

The Arab media feed this conspiracy-thinking with anti-American propaganda. For example, it was repeated throughout the Arab media, including by Al-Jazeera, that Jews did not go to work at

111. Rodney A. Smolla, *From Hit Man to Encyclopedia of Jihad: How to Distinguish Freedom of Speech from Terrorist Training*, 22 LOY. L.A. ENT. L. REV. 479, 484 (2002) (asking “to what extent do we take into account social and historical context . . . to determine if a person has gone beyond mere ‘membership’ [in a group with a violent agenda] or ‘abstract advocacy’ [of violence]?”).

112. EL-NAWAWY & ISKANDAR, *supra* note 16, at 61.

113. *Id.* at 60; see also HUNTINGTON, *supra* note 46, at 66 (contrasting Western and non-Western world views).

114. See Hafez, *supra* note 20, at 13 (noting that this is a “widespread view among Muslim thinkers”).

115. TIBI, *supra* note 46, at 79-80.

116. Andrea Stone, *Kuwaitis Share Distrust Toward USA, Poll Indicates*, USA TODAY, Feb. 27, 2002, at A7. However, this is not to say that Americans do not hold stereotyped views of Arabs or that Americans do not receive information about the Arab world through the prism of such stereotypes. See Hafez, *supra* note 20, at 15 (noting the “often very one-sided view of Islam in Western media”); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (examining racial stereotyping of Arabs in the aftermath of September 11, 2001); Gallup Poll Analysis, *The Impact of the Attacks on America* (Sept. 25, 2001), at <http://www.gallup.com/poll/releases/pr010914c.asp> (noting that one in three Americans supports internment of Arabs after September 11).

the World Trade Center on September 11.¹¹⁷ Another rumor that had currency in the Arab media was that the United States food relief packages dropped in Afghanistan were poisoned.¹¹⁸ Anti-Semitism of the worst kind, including allegations of “blood libel” common in the Middle Ages, also feature prominently.¹¹⁹ In this setting, it is hard to have faith that rationalism will overcome exhortations to violence or that the truth will ultimately emerge.

At least part of the explanation for the persistence of this conspiracy thinking is the extent to which political leaders in the Middle East have sponsored anti-American propaganda to maintain control of an increasingly radicalized population.¹²⁰ In the last thirty years, Islamic “fundamentalist” movements have threatened the legitimacy of preexisting autocratic regimes in the Arab Middle East.¹²¹ A growing class of “unemployed and disaffected young people”—the result of dramatic population growth and economic stagnation—have been the most willing adherents to “Islamist causes.”¹²² To understand the magnitude of this problem, consider that Arab birthrates are the highest in the world, while labor force participation is the lowest of any region.¹²³ To respond to the threat posed by this “youth bulge” of young radicals,¹²⁴ Middle Eastern leaders use anti-American propaganda, not only to prove themselves sufficiently Islamic (i.e., anti-Western),¹²⁵ but they also use anti-American propaganda to distract their citizens from their own failed

117. Campagna, *supra* note 15. *But see* EL-NAWAWY & ISKANDAR, *supra* note 16, at 64 (stating that Al-Jazeera has assisted in refuting some of the conspiracy theories surrounding September 11).

118. Thom Shanker & Eric Schmitt, *U.S. Warns Afghans That Taliban May Poison Relief Food*, N.Y. TIMES, Oct. 25, 2001, at B2.

119. *See* Michael Slackman, *The World Saudi Editor Retracts Article That Defamed Jews*, L.A. TIMES, Mar. 20, 2002, at A3.

120. *See, e.g.*, HUNTINGTON, *supra* note 46, at 217 (“Muslim governments, even the bunker governments friendly to and dependent on the West, have been strikingly reticent when it comes to condemning terrorist acts against the West.”); Richard Cohen, *The Ugly Arab Press*, WASH. POST, Mar. 13, 2001, at A21 (“Throughout the Arab world, the most ugly and ridiculous anti-American, anti-Israeli and anti-Semitic diatribes are routinely published in the press or aired on radio and television—and always with either the acquiescence or the prompting of the government.”).

121. *See* HUNTINGTON, *supra* note 46, at 111.

122. *Id.* at 211; *see also id.* at 112-13 (noting that the most highly educated young people are amongst those most attracted to Islamist causes).

123. Fouad Ajami, *The Crowd's Distraction*, U.S. NEWS & WORLD REP., Apr. 22, 2002, at 28.

124. *Id.*; *see also* HUNTINGTON, *supra* note 46, at 112-13.

125. *See* TIBI, *supra* note 46, at 66 (observing that Islamic fundamentalism has embraced modernity but rejected “Westernization”).

policies.¹²⁶ They thus “externalize” their costs—the social unrest created by lack of economic development, political institutions, or civil society in their countries—onto the United States. Standing alone, this would be more than sufficient justification for saying that *Brandenburg*’s incitement standard is not appropriate for export, at least when the incitement in question is directed externally, rather than internally (i.e., at the Arab governments themselves).

Thus, not only are the “evil counsels” common in Arab media government-sponsored, but there are few voices willing or able to correct them once they enter the marketplace of ideas.¹²⁷ With few exceptions, Arab governments control, directly or indirectly, both the domestic broadcast¹²⁸ and print media.¹²⁹ These governments limit the stock of information available to their citizens on matters

126. Bassam Tibi, *The Fundamentalist Challenge to the Secular Order in the Middle East*, 23 FLETCHER F. WORLD AFF. 191, 198 (1999). Tibi states:

In the Arab world, the ruling elites are preoccupied with maintaining power in their nation-states. They thus fail to address the issues that give rise to social unrest and discontent and are unable to provide the substantive stability, economic development and political institution-building that would lead to more participation and greater democratization.

Id.

127. Even though satellite television and the Internet have expanded the uncensored information available in the Middle East, it is primarily the elites who have access to these new media. See Hafez, *supra* note 20, at 1-2. Moreover, although the number of indigenous media in the Middle East has increased in the last ten years, “it is rather doubtful whether the new indigenous media allow for greater freedom of speech than the state media.” *Id.* at 3-4.

128. DOUGLAS A. BOYD, BROADCASTING IN THE ARAB WORLD: A SURVEY OF THE ELECTRONIC MEDIA IN THE MIDDLE EAST 5 (1999) (also noting, however, that many people in the Arab world can obtain foreign radio broadcasts); Hafez, *supra* note 20, at 4 (“Comparative analyses of global media development consider the Middle Eastern media system the most closed and controlled in the world.”).

129. As historian Bernard Lewis has noted, “What comes out of the radio and television set [in the Middle East] will be very largely determined by the form of government that prevails in the country, and by the head of state or head of government who operates it.” BERNARD LEWIS, THE MIDDLE EAST: A BRIEF HISTORY OF THE LAST 2,000 YEARS 13-14 (1995); see HUNTINGTON, *supra* note 46, at 113 (“The governments in the two score other Muslim countries [are] overwhelmingly nondemocratic: monarchies, one-party systems, military regimes, personal dictatorships, or some combination of these, usually resting on a limited family, clan, or tribal base . . .”); see also Hafez, *supra* note 20, at 6 (“The degree of press freedom corresponds to the nature of the respective political system in the sense that systems that are semiauthoritarian and patrimonial (Egypt, Morocco, Jordan, etc.) have allowed for more diversity than totalitarian and technocratic (military) systems (Iraq, Syria, etc.).”). Authoritarian governments predominate in the region.

of domestic policy by deploying such tactics as monopolistic control of the print and broadcast media, strict licensing regulations, and harassment and imprisonment of dissenting journalists.¹³⁰ A primary role of the media is to carry government propaganda to the people, not to provide objective news reports.¹³¹ Even among the available outlets for information, a substantial portion of the population is foreclosed from accessing the information by illiteracy.¹³² This gives broadcasters like Al-Jazeera even more power to use inflammatory coverage to incite the masses.

Brandeis's concept of public discussion as a political duty is, thus, anathema, for Brandeis's ideal relied on engaged individuals contributing their independent thoughts and beliefs to help forge public consensus. Yet this notion of citizens as "free individuals, and not as obliged members of collective entities" is absent in the Arab world.¹³³ There, too, the lack of secular civil society—a realm of association free of government or religious domination—helps prevent the development of meaningful public discourse. Even Al-Jazeera, whose critical coverage of many governments in the region is a stunning departure from the norm, has avoided all controversial coverage of the Qatari government,¹³⁴ choosing not to test its supposed independence from the Emir's control. To the extent that public consensus is deemed necessary, it is commanded by political or religious authorities,¹³⁵ rather than emerging from the will of the people. It is fair to conclude, therefore, that a fundamental pillar of

130. The Committee for Protecting Journalists, an international organization, produces an annual report on the state of press freedom in the Middle East and North Africa which can be accessed at Committee to Protect Journalists, at <http://www.cpj.org/attacks00/mideast00/mideast.html> (last visited Oct. 8, 2002).

131. See BOYD, *supra* note 128, at 5; LEWIS, *supra* note 129, at 11-14; Hafez, *supra* note 20, at 10 ("Many of the media do not, in fact, transfer 'knowledge' and information but act as a government-controlled apparatus to create and distribute pseudo-facts . . .").

132. HUNTINGTON, *supra* note 46, at 119.

133. See TIBI, *supra* note 46, at 193; Hussein Amin, *Mass Media in the Arab States Between Diversification and Stagnation: An Overview*, in MASS MEDIA, POLITICS & SOCIETY IN THE MIDDLE EAST, *supra* note 20, at 23, 39 (noting that in the Arab world censorship is "expected as a form of civic responsibility"); Thomas M. Franck, *Is Personal Freedom a Western Value?*, 91 AM. J. INT'L L. 593, 602 (1997) (quoting Professor M.M. Slaughter as stating that the Arab concept of self "is defined through traditions and concepts of honor. The [Western] concept of the autonomous self requires the free speech principle; the socially situated self of Islamic society necessarily rejects free speech in favor of prohibitions against insult and defamation.").

134. EL-NAWAWY & ISKANDAR, *supra* note 16, at 86.

135. See Hafez, *supra* note 20, at 11 (noting use of mass media by reactionary Islamist groups to further their agenda).

Brandenburg—rational deliberation by citizens engaged in open and unmediated public discourse—is absent in much of the Middle East.

A final fundamental pillar of *Brandenburg* is also missing. America is a stable democracy that provides avenues of peaceful political change through elections, thereby ameliorating the need for violence to achieve political goals or to vent rage at failed government policies. These avenues are blocked in most countries in the Arab world. The authoritarian regimes that govern the many Arab countries do not hold elections,¹³⁶ and those that do hold parliamentary elections often produce legislative bodies that are “too weak to question certain national policies.”¹³⁷ The young, angry, and disaffected masses have no way to make their will known to their leaders except through violence, and the leadership controls violence through harsh reprisals and channels it toward external targets. In this volatile situation, the line between advocacy of violence and incitement certainly must be drawn in a different place than it would be drawn in the United States.

It is therefore possible to argue that the United States has not applied a double standard of press freedom to Arab media or to Al-Jazeera itself. Although Al-Jazeera has been revolutionary in harshly criticizing many of the governments in the Middle East (Qatar excepted) and has brought issues to the table that simply could not be heard through the government-controlled media, Al-Jazeera has also adopted a tabloid model of journalism, and its programming panders to the rage of the Muslim street¹³⁸ (particularly with regard to the Israeli-Palestinian conflict).¹³⁹ In the United States, this type of tabloid journalism is common, but citizens can also turn to other news outlets to find a contrasting view. In the Middle East, this clash of opposing viewpoints is largely absent. By its own terms, therefore, *Brandenburg* should not apply.¹⁴⁰ And even applying *Brandenburg*, the radically different

136. But see TBI, *supra* note 46, at 196 (noting that Jordan holds elections and can boast of some democratic achievements).

137. Muhammad I. Ayish, *The Changing Face of Arab Communications: Media Survival in the Information Age*, in MASS MEDIA, POLITICS & SOCIETY IN THE MIDDLE EAST, *supra* note 20, at 111, 123.

138. As Fouad Ajami has observed, “[a] political culture that yields itself to the passions of ‘the street’ is a damaged culture.” Ajami, *supra* note 123, at 28.

139. Ajami, *supra* note 21, at 50.

140. I am therefore in agreement with Laura Palmer, who has argued that the American incitement standard “is the end product of the unique set of historical and social circumstances that have shaped American society.” Palmer, *supra* note 12, at 205. My primary argument in this section is that *Brandenburg*’s incitement standard should not apply in the Arab Middle East because the fundamental preconditions for a functioning marketplace of ideas do not exist. A legitimate response, however, is that protecting incendiary

context makes the line between advocacy of violence and incitement much easier to cross.

V. CONCLUSION: WINNING HEARTS AND MINDS

My hope is that this Article will serve as a reminder of why the United States can and should tolerate radical dissent even in a time of war. I also hope to make the case that the United States can, consistently with its own First Amendment ideals, request that Middle Eastern governments rein in inflammatory anti-American propaganda in their own media. The dramatic differences between the American marketplace of ideas and the Arab marketplace of ideas justify restricting *Brandenburg* to the unique soil out of which it arose.

The fact that United States policy is defensible, however, may ultimately be beside the point. By attacking Al-Jazeera, the United States government opened itself up to the charge of applying a double standard in the Middle East. Even if this charge is untrue, the perception that the United States applies a double standard on press freedom can only further hamper efforts to fix our "image problem" in the Middle East. Moreover, the Bush Administration's attacks on Al-Jazeera run the risk of enhancing, rather than diminishing, Al-Jazeera's credibility with its viewers. As the United States government seems to have realized, it is far better to attempt to rebut inflammatory speech (even at the risk of having our positions distorted), than to appear to attack Al-Jazeera's editorial freedom.

Having United States officials appear on Al-Jazeera cannot be our only weapon of public diplomacy, of course. Fortunately, the Bush Administration rejected the Pentagon's idea of feeding false information to foreign journalists.¹⁴¹ Instead, in typical American fashion, we have hired a Madison Avenue advertising expert to package our policies for an Arab audience.¹⁴² Under her direction, Voice of America's Arabic service has been repackaged as Radio Sawa (Radio Together) and is gaining market share rapidly.¹⁴³

expression in the Middle East will help create a marketplace of ideas. While it is true that *Brandenburg* both depends on *and* helps constitute a particular model of political discourse, I would argue that protection of incendiary expression, standing alone, will only undermine attempts to constitute a more rational model of discourse in the Arab Middle East.

141. *Pentagon Closes Propaganda Office*, QUILL, May 1, 2002, at 9.

142. Ajami, *supra* note 21, at 78 (noting that Colin Powell appointed Charlotte Beers as under secretary of state for public diplomacy and public affairs).

143. Felicity Barringer, *U.S. Messages to Arab Youth, Wrapped in Song*, N.Y. TIMES, June 17, 2002, at A8; Jane Perlez, *U.S. Is Trying to Market Itself To*

There is even talk of an American-sponsored twenty-four-hour Arabic news channel going head to head with Al-Jazeera.¹⁴⁴

Unfortunately, winning “hearts and minds” in the Arab Middle East is no easy task.¹⁴⁵ Institution-building, which includes providing subsidies to independent media, supporting secular education that fosters critical thinking, and supporting the development of civil society, must precede any real change in the Arab marketplace of ideas.¹⁴⁶ And there is little indication that most Middle Eastern regimes would or even could commit to building these types of institutions, for regime change might be the inevitable result. It is easier by far for them to displace their citizens’ discontent by demonizing the United States. This is not to say that the United States’ conduct in the Middle East has been blameless—certainly we have supported tyrannical despots for strategic purposes. Yet even though the United States has been guilty of applying double standards in some areas, the failure to export *Brandenburg’s* incitement standard to protect government-sponsored anti-American propaganda is not one of them.

Young, Suspicious Arabs, N.Y. TIMES, Sept. 16, 2002, at A1.

144. Hafez, *supra* note 20, at 1-2 (“To suggest that access to foreign media alone could revolutionize Middle Eastern societies, wipe away authoritarian rule, or modernize traditionalist lifestyles would be rather simplistic.”).

145. See Simon, *supra* note 17, at 29 (quoting Washington Post media reporter Howard Kurtz as urging Bush to win the “hearts and minds in the Arab world” by going on Al-Jazeera).

146. See, e.g., David Hoffman, *Beyond Public Diplomacy*, FOREIGN AFF., Mar.-Apr. 2002, at 84.